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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11 FRESNO DIVISION

13 **DAYMON JOHNSON,**

14 Plaintiff,

15 v.

17 **STEVE WATKIN, et al.,**

18 Defendants.

1:23-cv-00848-ADA-CDB

16 **DEFENDANT SONYA CHRISTIAN'S**
OBJECTIONS TO MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATIONS

19 Judge: The Honorable Ana I. de Alba
Trial Date: Not Scheduled
Action Filed: June 1, 2023

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[standing-ordersv2-](https://www.cccco.edu/-/media/CCCCO-Website/docs/procedures-standing-orders/december-2022-procedures-standing-ordersv2-all.pdf?la=en&hash=FF692A0AE8ACC8FE6BB2A4D75018302005A8A4D6)

[all.pdf?la=en&hash=FF692A0AE8ACC8FE6BB2A4D75018302005A8A4D](https://www.cccco.edu/-/media/CCCCO-Website/docs/procedures-standing-orders/december-2022-procedures-standing-ordersv2-all.pdf?la=en&hash=FF692A0AE8ACC8FE6BB2A4D75018302005A8A4D6)

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INTRODUCTION

The Magistrate Judge’s Findings and Recommendations are fundamentally flawed. The proposed preliminary injunction is neither narrowly tailored, nor does it reflect an understanding of how the California Community Colleges Board of Governors regulations operate in relation to the Chancellor’s guidance documents. It enjoins laws and regulations that exist for the benefit of California’s diverse population of two million community college students, and that do not apply to Plaintiff Daymon Johnson, so cannot cause him injury. And it misinterprets regulations, ascribing to them non-existent restraints on First Amendment rights.

The Findings and Recommendations also misinterpret facts upon which the Magistrate Judge bases his proposed rulings, improperly relying on purported employment decisions concerning a party not before the Court, and related to actions for which the Chancellor can in no way be held accountable.

Finally, on the basis of these erroneous findings, the Magistrate Judge recommends that the Chancellor’s motion to dismiss be denied. A correct reading of the facts and the law shows that the motion should be granted.

Accordingly, Defendant Sonya Christian, in her official capacity as California Community Colleges Chancellor, objects to the Magistrate Judge’s Findings and Recommendations as follows.

ARGUMENT

I. THE PROPOSED PRELIMINARY INJUNCTION WOULD BAR EVERY DISTRICT POLICY THAT PROMOTES DIVERSITY, EQUITY, INCLUSION, AND ACCESSIBILITY.

First, the Magistrate Judge’s proposed injunction is fatally overbroad because it forecloses **all** policies aimed at promoting diversity, equity, inclusion, and accessibility under which Johnson may be evaluated—even policies that have not yet been written, to which Plaintiff might not even be opposed. The State of California is committed to promoting “diversity and equity in fulfilling the [community college] system’s educational mission.” Cal. Code Regs. tit. 5, § 51200. That expression is intended to “guide the administration of all programs in the California Community Colleges, consistent with all applicable state and federal laws and regulations.” *Id.* Despite the

Magistrate Judge’s professed agreement that the State’s “aim of promoting diversity, equity, inclusion, and accessibility in California’s system of community colleges is undoubtedly important” (Findings and Recommendations that Pl.’s Mot. for Prelim. Inj. Be Granted in Part (F&R) at 2), the proposed injunction would bar any expression of these “important” goals. *Id.* Given this unqualified overreach, the Court should reject the proposed injunction.

A preliminary injunction must be “narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of the law.” *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) (cleaned up and citations omitted.) To meet this standard, “[i]njunctive relief should be no more burdensome to the defendants than necessary.” *Califano v. Yamasaki*, 442 U.S. 682, 702, (1979). If an injunction is not narrowly tailored, but is instead overly broad, the court abuses its discretion and the injunction should be vacated. *United States v. BNS, Inc.*, 858 F.2d 456, 460 (9th Cir. 1988).

Here, the Magistrate Judge concedes that the State’s policies expressed in the regulations are “important” (F&R at 2), and that “California’s goal of securing equal educational opportunities for nearly two million community college students is unquestionably appropriate and, in many respects, required by law.” *Id.* at 36. But the proposed injunction would nevertheless bar **any** policy that promotes diversity, equity, inclusion, and accessibility. Specifically, the Findings and Recommendations find that “the Undersigned finds it likely that at some point Plaintiff will face the consequences if he does not adhere to **whatever** competencies and criteria are imposed on him through the DEIA regulations.” *Id.* (emphasis added). The Magistrate Judge’s view is that no matter what non-regulatory guidance the Chancellor drafts, or what policies the Kern Community College District eventually crafts to acknowledge, promote, and accommodate the diversity of all California community college students, they will inevitably violate the First Amendment. Thus, the Magistrate’s proposed injunction would leave the California Community Colleges effectively barred from addressing an admittedly “important” educational aim.

The proposed injunction’s overbreadth, which would bar Johnson’s evaluation under **any** policy that might be drafted to promote diversity, equity, inclusion, and accessibility—determined

1 before the policy is even written—is breathtaking. Far from encouraging free expression, the
 2 Magistrate’s proposed injunction would muzzle the Chancellor and the District. The Court
 3 should reject the findings and proposed injunction on that basis alone.

4 **II. THE PROPOSED PRELIMINARY INJUNCTION IS BASED ON ERRONEOUS FACTUAL**
 5 **FINDINGS THAT DO NOT SUPPORT AN INJUNCTION.**

6 The Findings and Recommendations are replete with references to the District’s
 7 investigation and termination of a third party, Professor Matthew Garrett, ultimately concluding
 8 that because Johnson may, at some juncture, “engage in similar ‘political speech’ that Garrett,
 9 was, in part, punished for,” Johnson has “adequately demonstrated ‘injury in fact.’” F&R at 19-
 10 20. The Chancellor of the California Community Colleges has no role in district-level
 11 employment decisions—including those concerning Garrett—and does not respond to how the
 12 District renders its disciplinary decisions or what other relevant documents would show the
 13 efficacy of the District’s decision concerning Garrett. Even so, the Magistrate Judge has
 14 misinterpreted the few facts that can be established from the partial record, and that
 15 misinterpretation does not support the injunction imposed on the Chancellor.

16 A preliminary injunction may be reversed “where the district court abused its discretion or
 17 based its decision on an erroneous legal standard or on clearly erroneous findings of fact.” *Does*
 18 *1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). A court “abuses its discretion if its
 19 conclusions are ‘without support in inferences that may be drawn from the facts in the record.’”
 20 *LA Alliance for Human Rights v. County of Los Angeles*, 14 F.4th 947, 957 (9th Cir. 2021)
 21 (quoting *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)). Here, the
 22 interpretations and inferences concerning the District’s termination of Garrett are erroneous such
 23 that they cannot support the proposed injunction.

24 The Findings and Recommendations spend several pages discussing Garrett and his
 25 termination. F&R at 4-8, 19-20. Putting aside that the Chancellor has no role in such district-
 26 level termination decisions, the facts related to Garrett’s termination as recounted in the Findings
 27 and Recommendations do not support any finding that “enforcement authorities have
 28 communicated a specific warning or threat to initiate proceedings” against Johnson, or that there

1 has been a credible “history of past prosecution or enforcement” of a “law” that Johnson intends
 2 to “violate.” *Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2023). The Findings and
 3 Recommendations place undue weight on the district’s legitimate concern regarding Garrett’s
 4 apparent tolerance of vandalism perpetrated by the European-based hate group Hundred-
 5 Handers,¹ and his use of inflammatory right-wing rhetoric in the form of the conspiracy myth of
 6 “Cultural Marxism.”² F&R at 5. In addition to this, Garrett’s other disruptive conduct, standing
 7 alone, was ample justification for termination: he was found to have submitted numerous false
 8 and misleading claims and criminal accusations against District administrators, violated COVID-
 9 19 policies, and threatened and attempted to intimidate District trustees. *Id.* at 6-7.

10 All of the above actions were sufficient grounds to terminate Garrett. *See, e.g., Davenport*
 11 *v. Bd. of Tr. of State Center Cmty. Coll. Dist.* 654 F. Supp. 2d 1073, 1095 (E.D. Cal. 2009)
 12 (“[H]arsh and inappropriate treatment of Fresno City College faculty members, students, and
 13 employees violated school policy and called into question [plaintiff’s] fitness as a faculty
 14 member. Failure to perform in accordance with standards set by the employer is sufficient to
 15 constitute a legitimate business reason for termination.”). Yet the Findings and
 16 Recommendations minimize and mischaracterize these actions as “some expressions of ‘pure
 17 political speech’” for which “Garrett was, in part punished for” and in which Johnson ostensibly
 18 “intends to engage in” as well. F&R at 19. Again, setting aside that the Chancellor plays no part
 19 in district-level employment decisions, and that there is no complete record of what occurred in
 20 those proceedings,³ the District was well within its rights to terminate Professor Garrett for his

21 ¹ New York has investigated this group after finding stickers with violent messages such
 22 as “Multiculturalism kills” and “You are disrespected. You are white. Strike back” posted
 23 throughout the state. Ewan Palmer, *Stickers From White Supremacist Group with Links to*
 24 *Europe Found in New York: “They Are Inciting Fear and Division Within Our Communities”*,
Newsweek (Jul. 19, 2019), <https://www.newsweek.com/white-supremacist-stickers-new-york-troy-hundred-handers-1448252>.

24 ² Cultural Marxism is a “theory [holding] that self-interested Jews — the so-called
 25 ‘Frankfurt School’ of philosophers — planned to try to convince mainstream Americans that
 26 white ethnic pride is bad, that sexual liberation is good, and that supposedly traditional American
 27 values . . . are reactionary and bigoted.” Bill Berkowitz, “*Cultural Marxism*” *Catching On*,
 28 Southern Poverty Law Center Intelligence Report (Aug. 15, 2003)
<https://www.splcenter.org/fighting-hate/intelligence-report/2003/cultural-marxism-catching>.

³ Professor Garrett has appealed his termination with the California Office of
 Administrative Hearings. A decision on that appeal remains pending before an Administrative
 Law Judge.

1 “harsh and inappropriate treatment” of District administrators and staff, and for his pervasive
 2 violations of school policies. *Davenport*, 654 F. Supp. 2d at 1095. To conclude that the District’s
 3 decision to terminate Garrett for his patently “unprofessional conduct” somehow means that
 4 Johnson “will face consequences if he does not adhere to whatever competencies and criteria” the
 5 District ultimately promulgates lacks factual or legal support.

6 The Findings and Recommendations further incorrectly conclude that Johnson has “already
 7 been warned that if he posts on social media, like Garrett had,” he may be subject to further
 8 investigation. F&R at 19-20. As a preliminary matter, the Chancellor neither made any
 9 statement regarding any future investigation of Johnson by the District nor does she control the
 10 district-level officials who may have made such a statement. Thus, no injunction should issue
 11 against the Chancellor based upon this statement.

12 Moreover, these findings misstate the circumstances surrounding the District’s reservation
 13 of its rights to investigate future claims of harassment or bullying made against Johnson. There is
 14 no evidence that the District ever threatened to investigate Johnson merely for posting on social
 15 media, or for acting in a manner similar to Garrett. Rather, the record reflects that after an
 16 especially charged social media post by Bakersfield Community College Professor Andrew Bond,
 17 Johnson responded, in part “[h]ere’s what one critical race theorist at [Bakersfield College]
 18 sounds like. Do you agree with this radical SJW⁴ from [the College’s] English Department?”
 19 F&R at 4. In response to this mocking and pejorative post, Professor Bond filed an
 20 administrative complaint alleging that Johnson was “harassing and bullying” him. *Id.* Johnson
 21 was not disciplined for his social media post, but the District advised Johnson that—similar to all
 22 other staff—it would investigate “complaints of harassment and bullying.” ECF No. 1-3 at p. 10.
 23 Indeed, the District is bound by statute to investigate complaints of harassment and bullying. *See*,
 24 *e.g.*, *Woodland Joint Unif. Sch. Dist. v. Comm. on Pro. Competence (Zuber)* 2 Cal. App. 4th,
 25 1429, 1455 (1992) (secondary school teacher terminated for “bullying and threatening other

26 _____
 27 ⁴ “SJW” is the acronym for “social justice warrior,” “an often mocking term for one who
 28 is seen as overly progressive or left-wing. It is often abbreviated as SJW.” *Social Justice Warrior*, Merriam Webster Dictionary, <https://www.merriam-webster.com/wordplay/what-does-social-justice-warrior-sjw-mean> (last visited Nov. 28, 2023).

1 teachers” since a “professional educator should not need to be told that it is improper to launch
2 personal attacks on a fellow teacher”).

3 The Findings and Recommendations erroneously categorize the District’s instruction as
4 “the threat of invoking legal sanctions and other means of coercion, persuasion, and
5 intimidation,” citing *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2020). F&R at 20. But
6 similar to the prior misinterpretation of fact, the District’s instruction can in no way be considered
7 a “threat” or “coercion, persuasion, and intimidation,” but rather a statement of the protections
8 offered to all administrators, staff, and students under the Education Code. Harassment and
9 bullying are not and cannot be tolerated in California’s community colleges. Here, allegations of
10 the same were investigated and found to not be substantiated. But that does not in any way make
11 the law and the District’s actions a “threat” or “coercive.”

12 These misinterpretations of fact show that the Court would abuse its discretion if the
13 Findings and Recommendations were adopted. They should instead be rejected.

14 **III. THE PROPOSED PRELIMINARY INJUNCTION IS OVERLY BROAD IN ENJOINING**
15 **REGULATIONS THAT DO NOT APPLY TO PLAINTIFF.**

16 As noted above, the regulations in question express the State’s “commitment to diversity
17 and equity in fulfilling the [community college] system’s educational mission.” Cal. Code Regs.
18 tit. 5, § 51200. If adopted by the Court, the proposed Findings and Recommendations would bar
19 enforcement of these guiding expressions, most of which are not directed to Johnson, and thus
20 have no impact on his speech or pedagogy. Because the proposed injunction is not narrowly
21 tailored and does not remedy a significant risk of substantial harm that Johnson might incur, the
22 Court should reject the Magistrate Judge’s Findings and Recommendations.

23 “A preliminary injunction is ‘an extraordinary and drastic remedy, one that should not be
24 granted unless the movant, *by a clear showing*, carries the burden of persuasion.’” *Lopez v.*
25 *Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972,
26 (1997) (per curiam)). “[T]he basis for injunctive relief in the federal courts has always been
27 irreparable injury and the inadequacy of legal remedies.” *Weinberger v. Romero-Barcelo*, 456
28 U.S. 305, 312 (1982); *see also TransUnion LLC v. Ramirez*, — U.S. —, 141 S. Ct. 2190, 2203

(2021) (injunctive relief appropriate only if there is “concrete, particularized, and actual or imminent” injury in fact). The party seeking the injunction must prove that it faces a significant threat of irreparable harm. *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). Such proof is a “rigid constitutional requirement.” *Lopez v. Candaele*, 630 F.3d at 786. Importantly, injunctive relief should not impose unnecessary burdens that do not remedy a threat of significant harm. *Califano v. Yamasaki*, 442 U.S. at 702. The Findings and Recommendations here improperly enjoin the Chancellor’s lawful and valid aspirational statements concerning diversity, equity, inclusion, and accessibility.

In the Findings and Recommendations, the Magistrate Judge recommends that Defendants—including Chancellor Christian—“be enjoined . . . from enforcing” California Code of Regulations, title 5, sections 51200, 51201, 53425, 53601, 53602, and 53605, “and the customs, policies, and criteria in evaluating faculty performance against Plaintiff.” F&R at 44. The recommendation that all of these sections be enjoined is patently overbroad. Section 51200 expresses the California Community College Board’s “intent . . . that the statement on Diversity, Equity, and Inclusion set forth in Section 51201” be the Board’s “official position . . . on their commitment to diversity and equity in fulfilling the system’s educational mission and that it should guide the administration of all programs in the California Community Colleges.” Section 51201 further explains that “intent” and the Board’s “official position,” stating that the Board “embrace[s] diversity among students, faculty, staff, and the communities [it] serves.” The section further elucidates what the Board believes it must do to further its intent and goals concerning diversity and anti-racism. Neither regulation references any individual’s speech or beliefs, or purports to impose upon others the Board’s official recognition of the diversity of the community colleges. And, by their plain language, neither regulation can be enforced by the Chancellor against Johnson, because the regulations neither require Johnson to take or refrain from any action nor do they include any enforcement mechanism by which Johnson could be punished under them.

In recommending that these regulations be enjoined, the Magistrate Judge ignores that governmental entities like the Board are entitled to express their ideals and principles concerning

1 diversity, equity, inclusion, and accessibility, particularly when that expression does not regulate
 2 another person’s speech. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819,
 3 828, 833 (1995) (although “the government may not regulate speech based on its substantive
 4 content . . . when the State is the speaker, it may make content-based choices”); *see also Downs v.*
 5 *Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). Indeed, governmental
 6 entities “may decide not only to talk about . . . tolerance in general, but also to advocate such
 7 tolerance if it so decides.” *Downs* at 1014, (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

8 These two regulations in particular seek only to express the Board’s “intent” and “official
 9 position” concerning diversity, equity, inclusion, and accessibility, and in no way regulate
 10 Johnson’s—or anyone else’s—speech. Silencing the Board’s “official position” is unwarranted
 11 and legally unsupportable, and it would be an abuse of discretion to adopt the overly broad
 12 Findings and Recommendations enjoining the Board’s expression.

13 **IV. THE INJUNCTION IS IMPERMISSIBLY VAGUE.**

14 In addition to recommending that Defendants “be enjoined . . . from enforcing” California
 15 Code of Regulations, title 5, sections 51200, 51201, 53425, 53601, 53602, and 53605, the
 16 Findings and Recommendations also recommend enjoining “the customs, policies, and criteria in
 17 evaluating faculty performance against Plaintiff.” F&R at 44. The phrase “customs, policies, and
 18 criteria” is found nowhere in the regulations or the Chancellor’s recommendations, and
 19 Chancellor Christian can only guess at what this phrase intends to enjoin.

20 Federal Rule of Civil Procedure 65(d)(1)(C) requires that “[e]very order granting an
 21 injunction . . . must describe in reasonable detail—and not by referring to the complaint or other
 22 document—the act or acts restrained or required.” “Rule 65(d) requires the language of
 23 injunctions be reasonably clear so that ordinary persons will know precisely what action is
 24 proscribed.” *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985).

25 Here, the Chancellor’s recommendations are entitled “Diversity, Equity and Inclusion
 26 Competencies and Criteria.” But those recommendations do not use the phrase, nor are they ever
 27 called, “customs, policies, and criteria.” Pl.’s Mot. for Prelim. Inj., Ex. A, ECF 26-4. And the
 28 phrase appears nowhere within the laws and regulations to be enjoined.

1 “The danger of an overly broad injunction is that it will leave a litigant uncertain as to what
 2 he may or may not do without being in contempt of court.” *Wood v. Santa Barbara Chamber of*
 3 *Commerce, Inc.*, 705 F.2d 1515, 1525 (9th Cir. 1983). Here, Chancellor Christian is unsure
 4 what—if anything—is being enjoined when the Findings and Recommendations state that
 5 “customs, practices, and policies” are not to be used “in evaluating faculty performance against
 6 Plaintiff.” The Court should not adopt the hopelessly vague Findings and Recommendations.

7 **V. THE FINDINGS AND RECOMMENDATIONS ENJOIN A VALID REGULATION**
 8 **REQUIRING PROFESSORS TO DEMONSTRATE AN ABILITY TO WORK WITH A**
 9 **COMMUNITY COLLEGE CAMPUS POPULATION.**

10 The Legislature has appropriately authorized the Board of Governors for the California
 11 Community Colleges to “adopt regulations to establish and maintain the minimum qualifications
 12 for service as a faculty member teaching credit instruction.” Cal. Educ. Code § 87356. Under
 13 that law, professors are, among other things, required to have either a post-graduate degree or a
 14 lower degree with several years of professional experience. Cal. Code Regs. tit. 5, § 53410.
 15 Johnson does not and could not credibly challenge that the Board and Chancellor Christian have
 16 the authority to promulgate such minimum standards and require that professors meet them. See,
 17 e.g., Cal. Educ. Code § 87332(c) (allowing dismissal for “unsatisfactory performance”). “In
 18 addition to [the] category-specific qualifications . . . , [professors] shall demonstrate the ability to
 19 work with and serve individuals within a diverse community college campus environment as
 20 required by local policies regarding [diversity, equity, inclusion, and accessibility]
 21 competencies.” Cal. Code Regs. tit. 5, § 53425; *see also* Cal. Educ. Code § 87360(a) (“[D]istrict
 22 governing boards shall . . . develop criteria that include a sensitivity to and understanding of the
 23 diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community
 24 college students”). The Magistrate Judge’s recommendation that this requirement be enjoined is
 25 legally unsupportable, overly broad, and should be rejected.

26 It is axiomatic that the State may promulgate regulations and that community college
 27 districts may enforce them, terminating professors for “misconduct.” Cal. Educ. Code §§ 87732,
 28 87626. The Education Code provides that the evaluation processes must be “fair” and “basically
 similar in substance and intent” across all of the state’s community college districts, but it also

1 allows for local variation by “permit[ing] and encourage[ing] a district governing board to
2 establish evaluation procedures and standards which meet the particular needs of that district.”
3 Cal. Educ. Code § 87626. Thus, districts are authorized to enact evaluation processes as they see
4 fit, subject to the Legislature’s general guidance.

5 When determining if conduct may render a professor unfit, a fact-finder may evaluate,
6 among other issues, the “likelihood that the conduct adversely affected students or fellow
7 teachers.” *Id.* at 229; *see also West Valley-Mission Cmty. Coll. Dist. v. Concepcion* (1993) 16
8 Cal. App. 4th 1766, 1774. Evaluations that investigate “personnel disputes and grievances” will
9 rarely, if ever, implicate constitutional issues. *See Ellins v. City of Sierra Madre*, 710 F.3d 1049,
10 1057 (9th Cir. 2013) (“Speech that deals with individual personnel disputes and grievances that
11 would be of no relevance to the public’s evaluation of the performance of governmental
12 agencies” does not implicate First Amendment).

13 Here, the regulation in question requires that in addition to holding an advanced degree or
14 being experienced in their field, professors like Johnson “demonstrate the ability to work with and
15 serve individuals within a diverse community college campus environment as required by local
16 policies regarding [diversity, equity, inclusion, and accessibility] competencies.” Cal. Code Regs.
17 tit. 5, § 53425. The State and districts are entitled to require professors to “work with and serve”
18 diverse individuals. That does not amount to either compelled speech or a restriction on speech.
19 Indeed, if the inability to “work with others” descends into speech that is “harassing and
20 intimidating” and evinces an “intent to cause substantial emotional distress,” there are no
21 constitutional protections. *See United States v. Osinger* 753 F.3d 939, 947 (9th Cir. 2014), citing
22 *United States v. Shrader*, 675 F.3d 300, 312 (4th Cir. 2012).

23 Here, the proposed injunction would bar a requirement that professors “work with and
24 serve” diverse individuals. That over breadth renders the proposed injunction an abuse of
25 discretion, and the Court should reject the Magistrate Judge’s recommendations.
26
27
28

VI. THE FINDINGS AND RECOMMENDATIONS ERRONEOUSLY CONCLUDE THAT THE REGULATIONS DICTATE WHAT FACULTY MUST TEACH.

The Findings and Recommendations also err in concluding that the challenged regulations “dictate[] what faculty must teach.” F&R at 22. The Magistrate Judge cites to California Code of Regulations, title 5, sections 53602(a-b) and 53605(a) to support this conclusion. But nothing in either of these regulations mandates that any faculty member—including Johnson—“must teach” any particular lesson or engage in any particular speech in his or her classroom. Rather, section 53602 simply requires districts to consider employees’ “demonstrated, or progress toward, proficiency in [DEIA] competencies” that “enable work with diverse communities, as required by section 53425.” Cal. Code Regs. tit. 5, § 53602(a-b). Similarly, section 53605 requires only that faculty members “employ teaching, learning, and professional practices that reflect DEIA and anti-racist principles, and in particular, respect for, and acknowledgment of the diverse backgrounds of students and colleagues to improve equitable student outcomes and course completion.” Cal. Code Regs. tit. 5, § 53605(a). By their plain language, these regulations do not prescribe what a faculty member can or cannot say in the classroom, and thus do not violate any faculty members’ First Amendment rights.

The Findings and Recommendations do correctly state that the above regulations dictate “how [faculty] should teach” and “how they will be evaluated.” F&R at 22. However, such regulations neither regulate speech nor implicate the First Amendment. As set forth in Section IV, *supra*, the Board is authorized to establish minimum standards and evaluation criteria for their faculty members, to ensure that all faculty members are fit to teach. Cal. Educ. Code §§ 87732, 87626. The ability to facilitate “equitable student outcomes and course completion” (Cal. Code Regs. tit. 5, § 53605(a)), is undoubtedly a key component of a faculty member’s fitness to teach. For example, if students of a particular gender, race, socioeconomic, or disability status consistently perform poorly in, or fail to complete, a certain faculty member’s course, that could suggest that the faculty member reflect on their pedagogical methods to ensure students across diverse backgrounds can succeed. It is wholly appropriate for community college districts to evaluate their faculty members in these areas, to ensure that their 2 million students are all

1 granted equitable access to a high-quality education. Regulations aimed at ensuring that faculty
 2 members employ teaching methodologies that allow them to effectively interact with and educate
 3 students from all backgrounds do not impinge faculty members' speech, and thus do not raise any
 4 First Amendment concerns.

5 For these reasons, the Magistrate Judge's finding that California Code of Regulations, title
 6 5, sections 53602(a-b) and 53605(a)—or any of the other challenged regulations—"dictate what
 7 faculty must teach" (F&R at 22) should be rejected.

8 **VII. THE FINDINGS AND RECOMMENDATIONS MISINTERPRET THE CHANCELLOR'S** 9 **GUIDANCE.**

10 In the Findings and Recommendations, the Magistrate Judge acknowledges that the
 11 Chancellor's "Diversity, Equity and Inclusion Competencies and Criteria Recommendations," are
 12 a "starting point" for each district's reference "as they engage in their own local process to
 13 develop and adopt a personalized set of DEI competencies and criteria." F&R at 12. Despite that
 14 acknowledgment, the Findings and Recommendations then proceed to misinterpret these
 15 recommendations, making the illogical leap that because there is no "history of enforcement,"
 16 Johnson "has shown 'injury in fact' as to the DEIA regulations and the DEI Competencies and
 17 Criteria Recommendations." F&R at 23. The Findings and Recommendations also appear to
 18 conflate the Chancellor's recommendations, which are just that — recommendations — with
 19 regulations, which all parties agree the district is obligated to fulfill. *See, e.g.*, F&R at 37 ("[T]he
 20 State's interest in imposing the DEIA regulations and the DEI Competencies and Criteria
 21 Recommendations do not outweigh Plaintiff's First Amendment rights"). But the Findings and
 22 Recommendations use the Chancellor's recommendations — which districts are not required to
 23 implement — to bolster the Magistrate Judge's findings of a First Amendment violation. Without
 24 any evidence that the recommendations will play any role in Johnson's employment, there are no
 25 grounds for them to be enjoined, and the Court should reject the proposed injunction.

26 Regulations adopted through the formal regulatory process are binding on districts. *See*
 27 *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 7 (1998) ("regulations
 28 adopted by an agency to which the Legislature has confided the power to 'make law'" are

binding). But unless “adopted in accordance with the provisions” of law allowing the Board to promulgate regulations, “[n]either the Board nor the Chancellor may administer or enforce” any recommendation. *See* Cal. Cmty. Colls., Procedures and Standing Orders of the Board of Governors (Dec. 2022) ch. 2, § 200, <https://www.cccco.edu/-/media/CCCCO-Website/docs/procedures-standing-orders/december-2022-procedures-standing-ordersv2-all1y.pdf?la=en&hash=FF692A0AE8ACC8FE6BB2A4D75018302005A8A4D6> (last visited Nov. 28, 2023). Thus, while districts are “strongly” encouraged to review and use the Chancellor’s recommendations “as a reference”, no district is required to follow their specific provisions.

Despite the non-enforceable nature of the Chancellor’s recommendations to the district, the Findings and Recommendations use their language to conclude that they somehow “invalidate protected expressions of speech.” F&R at 37. But the recommendations—directed to districts—do nothing of the sort; instead, they only give guidance to districts as to how they might promulgate their own policies. Because the Chancellor’s recommendations do not “invalidate speech,” the Magistrate Judge’s reliance on their language to support the Findings and Recommendations is fundamentally flawed and should be rejected.

VIII. THE COURT SHOULD NOT ADOPT THE RECOMMENDATION TO DENY THE CHANCELLOR’S MOTION TO DISMISS.

The Magistrate Judge recommends that Chancellor Christian’s motion to dismiss under Federal Rule of Civil Procedure 12 should be denied given that he “substantially addressed and dismissed the same arguments” that were made in the Chancellor’s opposition to Johnson’s motion for preliminary injunction. (F&R at 40.) As shown above, the grounds on which the Findings and Recommendations are based are fundamentally flawed, misinterpreting facts and the breadth and meaning of Education Code section 87732 and 87735 and California Code of Regulations title 5, section 51200, 51201, 53425, 53601, 53602, and 53605. As discussed above, Chancellor Christian plays no role in applying these Education Code sections, and the regulations articulate the Board’s position concerning diversity, equity, inclusion, and accessibility, again imposing no mandatory duties on Johnson. For all these reasons, Chancellor Christian objects to

1 the recommendation that the motion to dismiss be denied, and urges this Court to reject it and
2 dismiss the action against her.

3 **CONCLUSION**

4 The preliminary injunction proposed by the Findings and Recommendations is overly broad
5 and misconstrues the regulations in question. Because they are based on misinterpretations of
6 both law and facts, Chancellor Christian respectfully requests that the Court reject them and
7 instead deny Johnson's motion for preliminary injunction and grant Chancellor Christian's
8 motion to dismiss.

9
10 Dated: November 28, 2023

Respectfully submitted,

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14 Supervising Deputy Attorney General

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21 *Community Colleges*

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CERTIFICATE OF SERVICE

Case Name: ***Johnson, Daymon v. Watkin,
Steve, et al.***

Case No. **1:23-cv-00848-ADA-CDB**

I hereby certify that on November 28, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANT SONYA CHRISTIAN'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 28, 2023, at San Francisco, California.

M. Mendiola
Declarant


Signature